IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

MAE B. BURGESS, Co-Administratrix, FRED FANCHER and ADRIAN J. GUM, Co-Administrators, of the Estate of T. A. BURGESS, Deceased,
Petitioners,

vs.

RELIANCE LIFE INSURANCE COMPANY, a Corporation,
Respondent.

No. 462

PETITION FOR CERTIORARI
and
BRIEF IN SUPPORT THEREOF.

RUBEY M. HULEN,
BOYLE G. CLARK,
JAMES E. BOGGS,
PAUL M. PETERSON,
WILLIAM H. BECKER,
HOWARD B. LANG, JR.,
W. L. NELSON, JR.,
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vs.

RELIANCE LIFE INSURANCE COMPANY, a Corporation,
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No. .....

PETITION FOR CERTIORARI.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

Your petitioners, Mae B. Burgess, coadministratrix; Fred Fancher and Adrian J. Gum, coadministrators of the estate of T. A. Burgess, deceased, file and submit this as their petition for writ of certiorari to review a decision and judgment of the United States Circuit Court of Appeals for the Eighth Circuit.

The Circuit Court of Appeals on May 29, 1940, reversed a decision and judgment of the District Court of the United States for the Western District of Missouri in favor of the petitioners herein and against the respondent, directing entry of judgment in favor of the respondent without further trial by a jury (Opinions, R. 344-355).

On June 12, 1940, your petitioners filed the following motions: (1) motion for rehearing (R. 391-413); (2) motion to modify opinion and remand cause for jury trial upon issue of insanity and upon issue of suicide, with affidavit of Dr. G. W. Robinson, psychiatrist, concerning his opinion of insanity to be offered on retrial; (3) motion to modify opinion and judgment by correcting certain statements and adding additional facts, material to the issues decided (R. 385-391); (4) motion to dismiss cause for lack of jurisdiction (R. 361-368). These motions were denied August 5, 1940 (R. 421-422). The mandate had been stayed by proper order (R. 424) and the cause is now filed and docketed herein for decision.

SUMMARY STATEMENT OF MATTER INVOLVED.

This cause was initiated by the respondent insurer as plaintiff in a declaratory judgment action filed in the United States District Court for the Western District of Missouri. The petition sought a declaratory judgment that T. A. Burgess, who was insured by the respondent for $11,000.00 against accidental death, did not die as a result of an accident. It was charged that the insured Burgess died as a result of suicide while sane. (Under the law of Missouri death is considered as accidental if it were unintentionally caused or if it results from suicide while insane.)

The answer denied the existence of an actual justiciable controversy and denied the allegation of the petition that the insured's death resulted from suicide while sane.

The cause was tried in the District Court and submitted to a jury upon special interrogatories touching the issues of sanity and suicide. The jury, after deliberating, advised the District Court in writing twice that it was equally divided on the question of whether the death was a suicide (R. 240-241). They further advised the Court (R. 241) that

the jury was unanimously agreed "that, whether accident or suicide, Mr. Burgess was not, at the time of the accident or suicide, in his normal mental condition." The District Court then gave a special charge upon what constituted insanity within the meaning of the law and submitted a special interrogatory touching that issue only (R. 242-243). The jury immediately found that the insured was insane, but returned no general verdict and made no general finding upon the question of accident or suicide (R. 244). The Court then instructed the jury that, having found insanity, the question of intentional self-infliction of the wound causing death was immaterial (R. 245). Thereupon the jury returned a general verdict for the petitioners (R. 246). The interrogatories with reference to suicide were never answered because of the jury's disagreement on that issue.

The only evidence offered by the respondent insurer in its case in chief were the policies of insurance involved and a coroner's certificate of death stating its cause to be "self-*inflicted* gunshot wound" and "suicide." (The certificate of death seems clearly incompetent under the Missouri law. This is the sole evidence offered to make a prima facie case for the respondent. The Court of Appeals refused to pass on its competency, at the same time holding that a prima facie case had been made. Question was raised at the trial by objection [R. 21-31], by motion for directed verdict [R. 34-35], in petitioner's brief on appeal [Point II, p. 58], and in the motion for rehearing [R. 393]. No ruling was ever secured from the Court of Appeals and no mention was made in the opinion of this vital question.)

At the close of the plaintiff's case, petitioners moved to dismiss for lack of jurisdiction because of failure to show an actual controversy (R. 34). This motion was denied by the District Court and a similar motion denied by the Court of Appeals (R. 361).

The insured Burgess met his death as a result of a wound from an old double-barrel shotgun which was dis-

charged while he was carrying it down the stairs at a rapid pace. There were no eyewitnesses to the discharge of the gun. The evidence was entirely circumstantial. (The evidence showed that the insured was acting strangely on the day of his death, and that he had been taking nembutal capsules to sleep; that this drug affected the mind severely. No witness expressed a formal opinion of sanity or insanity. Petitioners relied on the showing of irrational conduct and the fact that the burden of proof of sanity was upon the insurer to support a finding of insanity.)

The Court of Appeals held that the evidence showed, as a matter of law, that the insured committed suicide while sane and undertook to pass on all questions of fact and direct judgment contrary to and without the verdict of a jury. It found that the duty was upon the petitioners to offer a formal opinion of insanity. On motion for rehearing and motion to remand the petitioners offered to supply such an opinion on retrial and annexed an affidavit of a prominent expert that upon the uncontroverted facts he would render a formal opinion that the insured was insane at the time of and prior to his death (R. 378-383).

The principal opinion states that the defendants produced evidence on the issue of insanity "on the theory that the burden of producing evidence on that issue had shifted to them" (R. 350), and also states that "defendants, not relying on any presumption of accident arising from proof of death by violent and external means, attempted to prove by an expert how insured might have accidentally shot himself * * *."

On the question of the burden of the evidence the record shows that the petitioners herein at all times insisted that the burden of proo and burden of evidence with respect to sanity and suicide rested on the respondent insurer. Petitioners moved for a directed verdict on this

theory (R. 34-35). By proceeding to offer evidence after an adverse ruling by the Court, the petitioners waived nothing (Federal Rules of Civil Procedure 50). Petitioners also made a motion for a directed verdict at the close of all the evidence (R. 219). Both motions were made expressly upon the theory that the respondent insurer had failed to meet the burden of proof imposed upon it. At the request of the petitioners the Court instructed the jury that the burden of proof rested upon the respondent insurer (R. 224). In the briefs petitioners insisted and still insist that the burden of proof both in its primary and secondary sense rested upon the respondent insurer (R. 244). It is an inadvertent misstatement of fact to state that the petitioners tried this case upon the theory that the burden of proof in any sense was upon them.

On the question of reliance on the presumption of accident the record shows that the petitioners have at all times relied upon the presumption and inference of accident arising from proof of unexplained death by violent and external means without an eyewitness.

There is nothing in the record to justify the statement that petitioners did not rely on the usual presumption of accident, but the record shows reliance in the District Court and in the Circuit Court of Appeals on the presumption. *In the District Court:* Petitioners' motion for directed verdict at the close of respondent's evidence (R. 34-35); petitioners' motion for directed verdict at the close of all the evidence (R. 219); charge of Court on presumption given at request of petitioners (R. 224-225); exceptions to charge of Court by petitioners (R. 223); petitioners' request (R. 234-235); petitioners' exception (R. 299). *In the Circuit Court:* Petitioners' brief, Point IV, pp. 69-72, Point I (5), pp. 28-29; Motion for Rehearing (R. 396-399, 401, 410).

The principal opinion undertook to determine the ques-

tion of fact concerned by stating that the presence of blood in both barrels of the gun was uncontradicted proof of a physical fact wholly inconsistent with actual discharge of the gun (R. 353).

While petitioners do not consider such an isolated fact conclusive, they wish to point out that there was evidence both ways on this issue. Respondent's witness, the Coroner, could remember seeing blood in only one barrel (R. 42). The same is true of the respondent's witness, Patrolman Ridgeway (R. 207).

These erroneous statements in the opinion, as well as material facts favorable to petitioners omitted from the statement in the opinion, were called to the attention of the Court of Appeals by motion to modify (R. 385-390), which was denied (R. 422) without comment.

Review by this Court is sought under the provisions of Section 240 of the Judicial Code (43 Stat. 938).

QUESTIONS PRESENTED.

(1) Whether in directing the District Court to enter judgment for the respondent insurer without further submission of the issues to a jury the Circuit Court of Apepals usurped the functions of a jury and deprived the petitioners of a trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States.

(2) Whether the Circuit Court of Appeals ignored the applicable law of the State of Missouri that proof of an unexplained death by violent and external means without an eyewitness is sufficient proof to make a submissible case of death by accident.

(3) Whether the Circuit Court of Appeals erred in holding that in a declaratory judgment action of this character the defendants assumed the burden of proof which

they did not bear at the close of the plaintiff's case in chief, simply by introducing evidence of the circumstances of the insured's death, after their motion for directed verdict had been overruled.

(4) Whether, under the Federal Declaratory Judgments Act, an insurer may file suit without first denying liability and without investigating the case to determine liability; that is to say, whether a justiciable controversy exists where an insurer, upon receipt of claim, files suit without denying liability to the beneficiaries and without investigating the merits of the claim.

(5) Whether the Circuit Court of Appeals erred in holding that the Federal Rules of Civil Procedure 50 (b) require direction of verdict by the appellate court, even in cases when is it shown that the deficiency in proof found will be supplied on a retrial.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

(1) The Circuit Court of Appeals erred in finding, as a matter of law, that the insured died as a result of suicide while insane. It thereby usurped functions of a jury and deprived petitioners of a trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States.

(2) The Circuit Court of Appeals ignored the applicable law of the State of Missouri that proof of an unexplained death by violent and external means without an eyewitness makes a submissible case of death by accident.

(3) The Circuit Court of Appeals erred in holding that in a declaratory judgment action of this character the defendants assumed the burden of proof which they did not

bear at the close of the plaintiff's case in chief, simply by introducing evidence of the known circumstances of the insured's death after their motion for directed verdict had been overruled.

(4) The Circuit Court of Appeals erred in holding that an insurer may file suit under a declaratory judgments action without first denying liability to the insured and without investigating the case to determine liability; and in holding that an actual justiciable controversy exists where an insurer, upon receipt of claim, files suit without denying liability to the beneficiaries and without investigating the merits of the claim.

(5) The Circuit Court of Appeals erred in holding that the Federal Rules of Civil Procedure 50 (b) require direction of verdict by the appellate court, even in cases when it is shown that deficiency in proof found will be supplied on a retrial.

PRAYER FOR WRIT.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court for review and determination, on a date certain to be therein designated, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket "No. 11,657, Reliance Life Insurance Company, a corporation, appellant, v. Mae B. Burgess, Coadministratrix, and Fred Fancher and Adrian J. Gum, Coadministrators of the Estate of T. A. Burgess, deceased, appellees," and that said judgment of said United States Circuit Court of Appeals for the Eighth Circuit be reversed by this Honorable Court, and that the petitioners have such other and

further relief in the premises as to this Honorable Court seem meet and just.

MAE B. BURGESS, Co-Administratrix,
FRED FANCHER and ADRIAN J. GUM, Co-Administrators of the Estate of T. A. Burgess, Deceased,
Petitioners.

RUBEY M. HULEN,
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All of Columbia, Missouri,
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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

ASSIGNMENT OF ERRORS.

1. The Circuit Court of Appeals erred in passing on the issues of fact involved and in directing the entry of judgment. It thereby usurped the function of a jury and deprived the petitioners of a trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States.

2. The Circuit Court of Appeals erred in holding that under the applicable law a submissible case of accidental death was not made. The applicable law was the Missouri law, but a submissible case was made under either the Missouri rule or the federal rule.

3. The Circuit Court of Appeals erred in holding that in a declaratory judgment action of this character the defendants assumed the burden of proof which they did not bear at the close of the plaintiff's case in chief simply by introducing evidence of the circumstances of the insured's death after their motion for directed verdict had been overruled.

4. The Circuit Court of Appeals erred in holding that the District Court had jurisdiction of an action for declaratory judgment by an insurer who had filed suit without denying liability and without investigating the case to determine liability.

5. The Circuit Court of Appeals erred in refusing to remand the cause for a new trial upon the issue of suicide and upon the issue of sanity.

STATEMENT.

The facts have been stated as fully as the limits of this petition will permit in the petition itself. For the sake of brevity, they will not be reiterated here.

ARGUMENT.

I.

The opinion of the Circuit Court of Appeals in passing on the issues of fact involved and in directing the entry of judgment constituted the usurpation of the functions of a jury and deprived the petitioners of a trial by jury as guaranteed by the Seventh Amendment to Constitution of the United States.

This case presents the precise situation which Mr. Justice Black predicted would arise in his opinion in the case of *New York Life Insurance Company v. Gamer*, 303 U. S. 161. If it was thought that the question discussed by Mr. Justice Black was not squarely presented in the *Gamer* case, there can be no doubt but that it is squarely presented in this case. This was an unexplained death by violent and external means without an eyewitness and without a suicide declaration. The law of Missouri permits, if it does not require, the inference of death by accident under these circumstances. Of this there can be no doubt. (See Point II of this brief.) Since the decision in *Erie Railroad Company v. Thompkins*, 304 U. S. 64, it has been settled beyond doubt that the law of the State of Missouri governs the right to recovery. (If this were not true, even the federal rule, as announced in the principle opinion of the *Gamer* case, *supra*, would require submission of this case to a jury.)

The Circuit Court of Appeals arbitrarily undertook to pass upon the question of fact concerning the actual character of the insured's death. It could not constitutionally undertake to perform the functions of a jury and determine the issues of fact involved, where, as here, the issue was one which should have been submitted to a jury under the law of Missouri and the law of the United States. In

holding that a case submissible to a jury under the state law may be held to be nonsubmissible and determinable by a federal appellate court is a direct violation of the doctrine of *Erie Railroad Company v. Thompkins,* 304 U. S. 64.

II.

Under the law of Missouri, the applicable law, a submissible case of accidental death was made.

It is well settled in Missouri that where there is an unexplained death by violent and external means, without an eyewitness, a submissible case of accidental death is made. *Brunswick v. Standard Accident Insurance Company,* 278 Mo. 154, 213 S. W. 45, 7 A. L. R. 1213; *Andrus v. B. M. A. Association,* 283 Mo. 44, 223 S. W. 70, 13 A. L. R. 779; *Reynolds v. Maryland Casualty Company,* 274 Mo. 83, 201 S. W. 1128; *Gilpin v. Aetna Life Insurance Company* (Mo. App.), 132 S. W. (2d) 683; *New York Life Insurance Company v. Gamer,* 304 U. S. 161.

The Missouri rule is summed up in the *Andrus* case, *supra,* as follows:

> "In this case the plaintiff can recover only if death was produced by accidental means. If the insured was sane, fully conscious of the effect of his act, and consciously intended to inflict death upon himself, then the death which he inflicted in pursuance of that intention was not accidental. In the recent case of Brunswick v. Standard Acci. Ins. Co., 278 Mo. 154, 7 A. L. R. 1213, 213 S. W. 45, this court reviewed the authorities at great length in construing a clause similar to the one under consideration here. The following rules may be deduced from the holding in that case:
>
> "(a) If the deceased committed suicide while insane, his beneficiary could recover, and §6945 removes the defense of suicide.
>
> "(b) If the insured, while sane, for the purpose of

committing suicide, intentionally swallowed poison, his consequent death was not accidental within the meaning of the policy. 213 S. W., loc. cit. 47.

"(c) After it was shown that the insured swallowed the poison, and the question arose whether the act was accidental or intentional, a presumption arises from the love of life, in the absence of evidence upon the point, that it was accidental, and this presumption obtained until evidence was adduced in explanation of the act. 213 S. W., loc. cit. 49, 50.

"(d) If there was evidence upon the point in explanation of the manner in which the poison was taken, then the presumption ceased to exist, and it became a question of fact whether the death, self-inflicted, was accidental or intentional. Unless the evidence shows conclusively that the insured was sane, and intentionally took his own life, so that the court might declare as a matter of law that the death was intentional, it was a question for the jury, from such evidence as was produced, to say whether the insured was sane or insane at the time, and whether, if sane, the death was inflicted intentionally or accidentally.

"(e) The burden was on the defendant to prove that the death under such circumstances was intentional, and not accidental; that is, the burden would be upon the defendant, in a case of suicide, to prove that the insured was sane, and committed the act which took his life with the intention of committing suicide.

"It may be added that in the Brunswick Case there was no evidence indicating that the insured was insane, and there was considerable evidence indicating that he took cyanide of potassium with the intention of committing suicide. It was held that it was a question for the jury, and the case should be submitted to the jury. See, also, Reynolds v. Maryland Casualty Co., 274 Mo., loc. cit. 97, 201 S. W. 1128; Scales v. National Life & Acci. Ins. Co., ... Mo. ..., 212 S. W., loc. cit. 9."

All the Missouri cases cited above clearly declare the position that where the death is by violent and external means and there is no prior declaration of suicide and no eyewitness the case should be submitted to a jury.

"If the evidence in favor of suicide is wholly circumstantial, then it ought to be such and of such extent as to negative every reasonable inference of death by accident." *Brunswick* case, *supra*. In this case the Court assumed that there was blood in both barrels of the gun, and held this to conclusively show suicide. There was conflicting testimony on this point. Nevertheless, if it were a fact undisputed, no appellate court has the constitutional power to determine the issue of suicide by grasping an isolated inconclusive circumstance as a lever to overthrow a mountain of circumstantial evidence.

The record shows that two of the respondent's own witnesses saw blood in only one barrel of the gun (Coroner Toalson, R. 42; Patrolman Ridgeway, R. 207). The petitioners showed that the insured could not have discharged the gun, when held against his body at the angle indicated by the entry of the shot, intentionally (R. 183). In the Missouri courts this case would have been submitted to a jury under the authorities above. The federal system should not attempt to reach a contrary result. *Erie* case, *supra*.

The Circuit Court of Appeals erred in undertaking to resolve all issues of fact which should have beeen submitted to a jury. It thereby offended against the Seventh Amendment of the Constitution.

III.

The Circuit Court of Appeals erred in holding that in a declaratory judgment action of this character the defendants assumed the burden of proof which they did not bear at the close of the plaintiff's case in chief, simply by introducing evidence of the circumstances of the insured's death, after their motion for directed verdict had been overruled.

The defendants, petitioners herein, assumed the burden of proof which originally rested on the respondent, plaintiff, simply by introducing evidence of the circumstances of the insured's death after their motion for directed verdict had been overruled. The opinion of the Court of Appeals determines an important question of federal procedure in a manner that requires the exercise of the supervision of this Court. This point involves the broader question of the burden of proof generally in suits for declaratory judgments.

In holding that the petitioners produced evidence on the issue of insanity "on the theory that the burden of producing evidence on that issue had shifted to them," the Court announced a novel and vicious doctrine. As shown in the statement of this petition, the record clearly indicates that the petitioners insisted at all times that the burden of proof and the burden of the evidence was upon the respondent. It requested and secured a ruling at the outset of the trial. The Court ruled that the burden of proof in this case rested upon the respondent insurer (R. 19). After the motion for directed verdict at the close of the plaintiff's case was overruled the petitioners produced evidence of the circumstances surrounding the death which the respondent had failed to produce. By producing this evidence the petitioners are said to have assumed a burden which originally rested upon respondents. It is an incorrect and vicious doctrine here announced that the

defendant who produces evidence assumes the burden of proof or burden of the evidence which did not rest upon him. Such a ruling should be corrected by this Court.

The common law and Federal Rule 50 permit the adverse party to offer proof after the plaintiff's case is in and his motion for directed verdict has been overruled.

The Circuit Court of Appeals stated that by offering substantial evidence to show a possible theory of accidental death the presumption or inference of accident usually obtaining was forsaken and dissipated. The record shows, as set out in the statement of the petition, that the petitioners insisted throughout that they were entitled to the benefit of inference of accident in this circumstantial case. To hold that by offering evidence of the circumstances and a possible theory of death consistent with the inference of accident the burden is shifted is a novel and vicious doctrine which, in substance, deprives the petitioners of their constitutional right to trial by jury. We believe that this certainly deserves the consideration of this Court. In essence it involves the important questions of burden of proof and of the evidence in actions for declaratory judgments.

IV.

The Circuit Court of Appeals erred in holding that the District Court had jurisdiction of an action for declaratory judgment by an insurer who had filed suit without denying liability and without investigating the case to determine liability.

The Circuit Court of Appeals erred in holding that an actual justiciable controversy exists where an insurer upon receipt of claim files suit without communicating with the claimant its position and without investigating the merits of the claim so as to take a position. This question of lack of jurisdiction was raised by motion at the close

of the plaintiff's case in chief (R. 34). The pleadings had made an issue of the existence of an actual controversy and no proof had been produced by the plaintiff, respondent here. The question was raised in the Court of Appeals by motion to dismiss (R. 361-368).

Jurisdiction to render declaratory judgments are limited to cases of actual controversy (49 Stat. 1027, 28 U. S. C. A., Sec. 400; *Aetna Life Insurance Company v. Haworth,* 300 U. S. 227. Art. III, Sec. 2, Constitution of the United States).

The burden of proving the existence of the actual controversy rests upon the party bringing the action. Both the principal opinion of Judge Gardner and the separate concurring opinion of Judge Sanborn agree upon this point.

Judge Sanborn said: "My opinion is that the burden of proving the existence of the controversy was on the plaintiff * * *" Judge Gardner, in his opinion, says: "It is a fundamental rule that the burden of proof in its primary sense rests upon the party who, as determined by the pleadings, asserts the affirmative of an issue * * *"

The appellant insurer totally failed to prove the existence of an actual controversy.

The only evidence offered by the appellant insurer to prove the existence of an actual controversy and to make its *prima facie* case on the merits were the policies involved and the coroner's certificate of death. Here absolutely no showing was made concerning the existence of an actual controversy as was made in *Aetna Life Insurance Company v. Haworth*, 300 U. S. 227, and *New York Life Insurance Company v. Roe* (C. C. A. 8), 102 F. (2d) 28. The record is devoid of any proof showing the existence of an actual controversy ripe for judicial determination. Because of this failure of proof, the District Court should have sustained the motion to dismiss. Neither the

District Court nor the Court of Appeals had any jurisdiction to determine this case on the merits.

An actual controversy does not exist unless "prior to the suit, the parties take adverse positions with respect to their obligations."

This suit was filed December 20, 1938. Never, prior to that time or since, has the appellant insurer denied liability to the appellees. The mere filing of the suit is all that can be found concerning the existence of the controversy. But the law requires that the parties take adverse positions with respect to their obligations before the filing of suit. No such thing occurred here. A plaintiff in a declaratory judgment action may not just file suit and proceed leisurely to investigate the claim and then to offer evidence on the merits where the existence of the controversy is denied. *Aetna Life Insurance Company v. Haworth, supra; New York Life Insurance Company v. Roe, supra.*

This record does disclose, however, that the insurance company did not make its investigation until about two months after the suit was filed (see R. 70, 66, 91), when long after the filing of this suit occurred, petitioners permitted disinterment of the body to investigate and substantiate their claim. The insurance company filed this suit without denying liability and then proceeded to investigate it. It used the process of the District Court to investigate by deposition, March 10, 1939, about three months after filing suit (R. 132). There was no jurisdiction to hear the cause and the suit was improperly filed.

It is clear that the *Aetna Life Insurance Company v. Haworth, supra,* ruled an entirely different situation. In the *Haworth* case, the parties took definite adverse positions, announced to each other before the suit was brought and, as pointed out in the Roe case, the beneficiary made

repeated claims over a period of years against the company but failed to bring any action after a denial of his claim. In the Aetna case this required the company to maintain reserves and to take cognizance of a possible outstanding liability which the beneficiaries would not cause to be adjudicated by filing suit.

In this case the action was brought without a denial of liability. In the *Haworth Case, supra,* the opinion reveals the following:

> "There is here a dispute between parties who face each other in an adversary proceeding. The dispute relates to legal rights and obligations arising from the contracts of insurance. The dispute is definite and concrete, not hypothetical or abstract. *Prior to this suit, the paries had taken adverse positions with respect to their existing obligations.* Their contentions concerned the disability benefits which were to be payable upon prescribed conditions. On the one side, the insured claimed that he had become totally and permanently disabled and hence was relieved of the obligation to continue the payment of premiums and was entitled to the stipulated disability benefits and to the continuance of the policies in force. The insured presented this claim formally, as required by the policies. It was a claim of a present, specific right. On the other side, the company made an equally definite claim that the alleged basic fact did not exist, that the insured was not totally and permanently disabled and had not been relieved of the duty to continue the payment of premiums, that in consequence the policies had lapsed, and that the company was thus freed from its obligation either to pay disability benefits or to continue the insurance in force. Such a dispute is manifestly susceptible of judicial determination." (Italics ours.)

It is very definitely asserted by Borchard that "* * * there is no justiciable issue until he (the plaintiff) trans-

lates his doubt into a claim of right and asserts it against a defendant having an interest and contests it." Borchard, Declaratory Judgments, page 32. Here there was no assertion of any claim of right by this plaintiff against these defendants before the commencement of this action.

It is further clear that until there is an "actual antagonistic assertion and *denial of right,*" there is no "actual controversy." Borchard, Declaratory Judgments, pages 35, 254.

In this case the respondent instituted this action without a word and began a "fishing expedition." Under these circumstances an action for declaratory judgment will not lie.

To hold that there is jurisdiction in this proceeding is to violate the Constitution of the United States limiting the jurisdiction of the courts of the United States to "cases" and "controversies." Further it violates the Federal Declaratory Judgments Act which limits jurisdiction thereunder to cases of actual controversy. It would encourage the practice by the insurance companies of rushing in and filing a suit before ever investigating them and without denying liability to the claimant. Investigations then proceed after the filing of the suit. Certainly such a practice is not to be tolerated.

Jurisdiction Can Be Raised at Any Time.

It is well settled that lack of jurisdiction in a declaratory judgment suit may be raised at any time; here it was raised at the first opportunity. *Garden City News v. Hurst,* 129 Kan. 365, 282 Pac. 120; *Taylor v. Haverford Twp.,* 299 Pa. 402, 149 Atl. 639; *Heller v. Shapiro,* 208 Wis. 310, 242 N. W. 174, 87 A. L. R. 1201.

V.

The Circuit Court of Appeals erred in refusing to remand the cause for a new trial upon the issue of suicide and upon the issue of sanity.

The Circuit Court of Appeals, in the concluding paragraph of Judge Gardner's opinion (R. 353) holds that the cause should not be retried, but that judgment should be entered for the plaintiff despite the fact that in the motion for rehearing and motion to remand the petitioners offered to supply on retrial a formal opinion of insanity found lacking by the Court. This opinion is based upon purely uncontroverted facts found in the record and stated in the opinion (R. 378-414).

The Circuit Court of Appeals for the Eighth Circuit had previously held that rule 50 *required* the entry of judgment for the appellant without retrial where it made a motion for directed verdict or for a new trial under rule 50. *Massachusetts Protective Association, Inc., v. Mouber*, 110 Fed. (2d) 203; *Louden v. Denton*, 110 Fed. (2d) 274. Following these cases the Court of Appeals assumed that rule 50 *required* it to direct entry of judgment without remanding the cause. This is likewise an important question of federal practice which should be determined. We do not believe that it was the intention of the federal rules to make any changes in the practice of remanding cases to permit the technical inadequacies of proof to be supplied. In fact, rule 50 expressly permits the judgment to be reopened, stating that the Court may "* * * order a new trial or direct entry of judgment as if the requested verdict had been directed."

The Circuit Court of Appeals for the Eighth Circuit has unduly restricted its own right to remand for a new trial where a motion under rule 50 (b) is granted. This is the third case where this misconstruction has been ap-

plied. See the *Mouber* case, *supra,* and the *Denton* case, *supra.* The question is sufficiently important to require the exercise of this Court's judicial supervision.

CONCLUSION.

It is, therefore, respectfully submitted that this cause is one calling for the exercise by this Court of its supervisory powers, in order that the errors herein pointed out may be corrected; that the law, both as to substance and procedure, may be properly and authoritatively defined, and that the judgment of the United States Circuit Court of Appeals for the Eighth Circuit may be reversed in order that justice may be done to the petitioners; and that to such an end a writ of certiorari should be granted and this Court should review the opinion of the United States Circuit Court of Appeals for the Eighth Circuit and finally reverse it.

MAE B. BURGESS, Co-Administratrix, FRED FANCHER and ADRIAN J. GUM, Co-Administrators of the Estate of T. A. Burgess, Deceased,
Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

MAE B. BURGESS, Co-Administratrix, FRED FANCHER and ADRIAN J. GUM, Co-Administrators, of the Estate of T. A. BURGESS, Deceased,
Petitioners,

vs.

RELIANCE LIFE INSURANCE COMPANY, a Corporation,
Respondent.

No. 462.

MOTION FOR REHEARING.

RUBEY M. HULEN,
BOYLE G. CLARK,
JAMES E. BOGGS,
PAUL M. PETERSON,
WILLIAM H. BECKER,
HOWARD B. LANG, JR.,
W. L. NELSON, JR.,
All of Columbia, Missouri,
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MOTION FOR REHEARING.

Come now the petitioners Mae B. Burgess, coadministratrix, Fred Fancher and Adrian J. Gum, coadministrators of the estate of T. A. Burgess, deceased, and move the Court to rehear the petition for certiorari heretofore filed herein and denied on November 12, 1940, by order of this Court. The said petition for certiorari requested review of the opinion and judgment of the Circuit Court of Appeals for the Eighth Circuit in the cause of *Reliance Life Insurance Company v. Burgess*, 112 Fed. (2d) 234.

The rehearing is requested for the following reasons:

1. The petitioners feel that the original petition for certiorari filed herein did not clearly present the question of

the misconstruction of Rule 50, Federal Rules of Civil Procedure, by the Eighth Circuit Court of Appeals in this and other cases. In the case at bar and in the cases of *Massachusetts Protective Association v. Mouber* (C. C. A. 8th), 110 Fed. (2d) 203, and *Lowden v. Denton* (C. C. A. 8th), 110 Fed. (2d) 274, the Eighth Circuit Court of Appeals has adopted a peculiar construction of Rule 50 *construing Rule 50 to prevent remand for a new trial where motion for directed verdict is made, even though it is evident that the deficiency of proof found on appeal may be supplied on a retrial.*

On motion for rehearing in the Circuit Court of Appeals, the petitioners supplied affidavit of an alienist of a formal opinion of insanity to be offered on retrial (R. 414, 378). Until the opinion of the Court of Appeals, petitioners believed insanity submissible on the facts without a formal opinion thereof.

2. In the oral argument of the cause of *Montgomery Ward and Company, Inc., v. Duncan*, had on November 12, 1940, it was developed that the Eighth Circuit Court of Appeals had been consistently giving a peculiar construction to Rule 50. The opinion in *Reliance Life Insurance Company v. Burgess* was cited by counsel in that case as the latest of this series of unusual rulings under Rule 50. The importance of the case was emphasized by the continued reference thereto and discussion thereof by this Court and counsel in oral argument of the *Montgomery Ward and Company* case. In view of the argument in that case, the petitioners feel that the importance of this matter is made to appear more clearly.

3. The ruling of the Eighth Circuit Court of Appeals in the case at bar, the *Reliance* case, is in conflict with (a) Rule 50 itself, (b) the practice obtaining prior to the adoption of Rule 50.

Conclusion.

For the reasons set forth herein, the petitioners respectfully submit that the order in this cause denying the petition for review should be set aside and a rehearing granted.

Respectfully submitted,

RUBEY M. HULEN,
BOYLE G. CLARK,
JAMES E. BOGGS,
PAUL M. PETERSON,
WILLIAM H. BECKER,
HOWARD B. LANG, JR.,
W. L. NELSON, JR.,
All of Columbia, Missouri,
Attorneys for Petitioners.

Certificate of Counsel.

I, William H. Becker, counsel for the petitioners herein, certify that this motion was presented in good faith and not for delay.

William H. Becker.

SUGGESTIONS IN SUPPORT OF MOTION FOR REHEARING.

The interpretations given Rule 50 by the Circuit Court of Appeals for the Eighth Circuit in this and other cases is a matter of general importance and concern. The Circuit Court of Appeals for the Eighth Circuit has construed Rule 50 to deprive it of the power, enjoyed before the Rules of Civil Procedure were adopted, to remand causes for a new trial where the evidence has not been fully developed, and it is evident that this deficiency in proof found by the appellate court can be supplied on a retrial.

In the case at bar the District Court submitted to the jury the question of insanity upon evidence of peculiar conduct on the part of the insured. Both counsel for the petitioners and the District Court acted under the impression that insanity could be submitted upon proof of conduct inconsistent with sanity without the formal opinion of an expert. The Circuit Court of Appeals held that a formal opinion was necessary, but refused to remand the case for a new trial to permit the claimants to fully develop their case by offering a formal opinion of insanity. The affidavit of an outstanding psychiatrist was attached to the motion for rehearing (R. 414) and to the motion to remand for a new trial (R. 378). It was therefore evident that the deficiency in proof found would be supplied. But the Circuit Court of Appeals for the Eighth Circuit erroneously held that, under Rule 50b, it had no discretion, but *must* direct the entry of judgment on the merits without a retrial. This ruling was based upon two prior decisions of the same Court. *Massachusetts Protective Association v. Mouber* (C. C. A. 8th), 110 Fed. (2d) 203, and *Lowden v. Denton* (C. C. A. 8th), 110 Fed. (2d) 274. All three of these cases construe Rule 50 to give the moving party under Rule 50b the right to have the case reversed without a new trial. (See in particular *Lowden v. Denton*, supra.)

Rule 50b, by its express terms, gives the Court the power to enter judgment on the motion or to grant a new trial where a verdict is returned by the jury. In this respect it provides as follows:

> "If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed."

It has long been the practice to remand cases for a new trial for further production of proof where the record is deficient in a material matter which may be supplied. *Roberts v. Lewis,* 144 U. S. 653, 36 L. Ed. 579; *United States v. Rio Grande Dam and Irrigation Company et al.,* 184 U. S. 416, 46 L. Ed. 619.

It is authorized when the justice of the case requires it to direct a new trial. 3 Am. Jur., Appeal and Error, § 1218, pp. 7-9, and cases cited in Note 8.

There is no indication in the notes of the Advisory Committee that there was any intention to deprive a reviewing court of this power.

Respectfully submitted,

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